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No. 84-1800

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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SUPREME COURT, U.S.

RICHARD WALTERS AND
RONALD SCHINK,

Petitioner

v

FLOYD SPRUYTTE,

Respondent

/

BRIEF IN OPPOSTION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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9 pp

QUESTIONS PRESENTED

I. Whether state officials may defeat a prisoner's state created Constitutional entitlement and bypass due process requirements without first making a determination based on the legally relevant criteria required by a State Administrative Rule.

II. Whether state officials who violate clearly established state regulations may retain qualified immunity.

III. Whether state officials sued in their individual capacities are entitled to Eleventh Amendment protection in applying a Policy Directive invalid as a matter of State Law when the State Agency is required to act pursuant to rule but has failed to do so.

TABLE OF CONTENTS

	Page Nos.
Questions Presented for Review	i
Index of Authorities	iii
Opinions Below	1
Jurisdiction	1
Contitutional Provisions, Statutes, Administrative Rules, Policy Directives and Court Rules Involved	1
Statement of the Case	1
Argument	2

INDEX OF AUTHORITIES

Cases	Page Nos.
Bills v Henderson, 631 F2d 1287 (6th Cir. 1980)	3
Demery v Kupperman, 735 F2d 1139 (9th Cir. 1984)	5
Edelman v Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L Ed2d 662 (1974)	5
Ex Parte Young, 209 U.S. 123, 28 S. Ct. 1683, 52 L Ed 714 (1908)	4
Hewitt v Helms, 459 U.S. 460 (1983)	3
Marsh v Michigan Department of Corrections, No. 80-11531-CA (Marquette Cir. Ct. August 19, 1980)	5
Marsh v Michigan Department of Corrections, No. 11531, (Marquette Cir. Ct. November 5, 1981)	5
Mithrander v Michigan Department of Corrections, No. 11531 Slip op. at 4 (Marquette Cir. Ct. November 5, 1981)	5
Mithrander v Michigan Department of Corrections, No. 11531 Slip op. at 4 (Marquette Cir. Ct. February 11, 1983)	5
Pennhurst State School & Hospital v Halderman, 104 S. Ct. 900 (1984)	4
Scheuer v Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L Ed2d 90 (1974)	4
Other:	
State Administrative Rule 719.6603(3)	1,2

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OPINIONS BELOW

Petitioners adequately described the history of this case.

JURISDICTION

Petitioners seek review of the Court of Appeals Opinion filed in ths cause on January 28, 1985. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ADMINISTRATIVE RULES, POLICY DIRECTIVES AND COURT RULES INVOLVED

The Petition for Writ of Certiorari adequately sets forth the relevant Statutes, Administrative Rule and Policy Directive with the exception of Administrative Rule 719.6603(3) which provides:

> "There is no limit on the amount of incoming mail a resident may receive. Incoming mail from other correctional facilities may be read, and all incoming mail shall be opened and inspected for money and contraband prior to delivery to addressee. The department shall follow the guidelines of the auditor general for receiving and safe handling of money and valuables confiscated from incoming mail. A resident may receive any book, periodical, or other publication which does not present a threat to the order of security of the institution or to resident rehabilitatio

STATEMENT OF THE CASE

Petitioners adequately recites the basic facts and history of this action.

ARGUMENT

1. Petitioners allege that Michigan Administrative Rule 791.6603(3) does not purport to define threats to security or resident rehabilitation and leaves broad discretion to prison administrators to adopt procedures and restrictions is accordance with the objectives stated. Such a contention is based upon a narrow and misleading iteration of the Rule, which requires, as well, that "all incoming mail shall be opened and inspected for money and contraband prior to delivery to the addressee".

Petitioners apparently wish to convince this Court that by not defining "a threat to security" or "resident rehabilitation" the Rule thus affirmatively grants to prison officials the right to arbitrarily regulate receipt of books under the guise of discretion. At a minimum, the Rule requires individual inspection, not only for money or contraband, but for a determination that the publication in question is a threat to order or security or resident rehabilitation. Petitioners do not engage in the ridiculous assertion that the dictionary sent to Mr. Spruytte is any of the above.

2. Petitioners argue that State creation of a federally protected interest by means of administrative regulation requires mandatory and substantive limitations on official discretion of the decision maker, as well as a "shall/unless" formula. The Court of Appeals found just such restrictions:

> "The Rule states a prisoner 'may receive any book which does not present a threat to the order or security of the institution or to resident rehabilitation'. If a prisoner may (emphasis added) receive any non-threatening book, it follows that officials may not (emphasis added) prohibit receipt of a book unless (emphasis added) they determine that the book poses a threat to the administration of the prison ... Thus, a finding that an individual book present(s) a threat to the order or security of the institution is a specific substantive predicate to withholding of the book from the prisoner. Because specific, substantive criteria restrict officials' discretion, the Rule creates a federally protected interest." (Attachment No. 3, p. 31a, Petition for Writ of Certiorari)

Petitioners allegation that the inclusion of the word "may" in the

Rule defeats the creation of a federally protected interest, calls for taking words out of any reasonable context and is a flawless example of attempting to elevate form over substance.

3. Petitioners err in casting the opinion of the Court of Appeals as one of "elevating alleged non-compliance with a state procedural requirement to the level of a Constitutional violation under the guise of a liberty interest requirement". Rather, the Court of Appeals based its finding of violation on the States' failure to make the substantive determination required by a Rule which by its very terms created a federally protected Constitutional interest. Any contention that the Court of Appeals did not quarrel with the validity of "publisher only" restrictions is irrelevant, since the opinion clearly stated that the Michigan Department of Corrections had no such rule.

> "In the face of available illustrative models and an uncomplicated task, the drafters of the Administrative Rule produced a regulation that permits a prisoner to receive 'any book, periodical or other publication' unless the book poses a threat to security. The language of the Administrative Rule does not so much as hint at adoption of a publisher only rule. The unavoidable inference is that the drafters of the Rule rejected adoption of a publisher only limitation". (Attachment No. 3, p. 24a, Petition for Writ of Certiorari)

4. Further, Petitioner obscures the facts in its assertion that the Court of Appeals held the application of the Policy Directive violated Respondent's due process rights, even though Respondent had received notice and a hearing prior to the return of the dictionary. In fact, the Court of Appeals chose not to beleaguer the usual requirements of due process but noted instead,

> "The right that was denied Sprnytte is one that is fundamental to procedural regularity. He was denied the right to require the State to make a determination (emphasis by Court of Appeals) based on legally relevant criteria ... The due process violation is not that the officials' finding was erroneous, but that they did not make any relevant finding." (Attachment No. 3, pp. 32-33a, Petition for Writ Certiorari)

5. Petitioners then attempt to manufacture an argument that the decision below conflicts with Bills v Henderson 631 F2d 1287 (6th Cir. 1980) and Hewitt v Helms 459 US 460 (1983), which held that a failure to follow state procedural rules does not in itself implicate .

constitutional interests. The Court of Appeals dealt dispositively with that very concern:

> "True, the state's failure to comply with its own procedural requirements is not in itself (emphasis added by Court) a violation of due process. See Bills v Henderson 631 F2d 1287, 1296-98 (6th Cir. 1980). We conclude, however, that when a state creates an entitlement and provides that it may not be defeated except upon a finding of a specific substantive predicate, the state's defeat of that entitlement without making such a finding is a violation of due process. Indeed, it would be anomelous to conclude that federal courts may impose on states procedures that are designated to enhance the accuracy of factual findings but then conclude that federal courts may not require that the factual findings be made. Our conclusion is well supported in the case law." (Attachment 3, pg. 33a Petition for Writ of Certiorari).

6. Petitioners argue that Pennhurst State School and Hospital v Halderman 1045 Ct. 900 (1984) requires interpretation with respect to the question whether the Eleventh Amendment bars Federal Court jurisdiction when state officials are sued in their individual capacities. Petitioners simply disregard that Pennhurst held that the fiction of Ex Parte Young 209 US 123, 28 S.Ct. 441, 52 L. Ed. 714 (1908) (state officer acting under State law in a manner violative of the Constitution is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct and State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. Scheuer v Rhodes 416 US 232, 94 S.Ct. 1683, 40 L. Ed. 90 (1974), interpreting Ex Parte Young) does not apply only when the claim is that state officials violated state rather than federal law and the action is otherwise one against the state.

Petitioners attempt to coerce this Court's attention by miscasting Spruytte's claim as a violation of state law. The Court of Appeals found that the violation by State Officials was of Mr. Spruytte's federal constitutional rights, i.e. that State Officials acted contrary to clearly established state regulation which granted a protected Constitutional interest, and did so in a manner which denied due process of law.

Petitioners contention that because the Court of Appeals

determined as one of many factors whether the Policy Directive in question had been adopted in accordance with state procedural law, Mr. Spruytte's claim is suddenly and magically transformed into a pendant state law claim barred by Pennhurst is also misplaced. Respondent's claim is not in any manner simply questioning state procedural law and the Court of Appeals made this abundantly clear.

Here the state officials sued in their individual capacities applied a Policy Directive deemed invalid on three separate occasions by a Michigan Circuit Court and in the face of Circuit Court determination that the Michigan Department of Corrections was in contempt of Court for the very issue before the state officials in this case. Mithrander v Michigan Department of Corrections No 11531, slip op. at 4 (Marquette Circuit Court, February 11, 1983) Mithrander v Michigan Department of Correction No. 11531, (Marquette Circuit Court, November 5, 1981) Marsh v Michigan Department of Corrections No. 11531, slip op at 4 (Marquette Circuit Court, March 30, 1981); Marsh v Michigan Department of Corrections No. 80-11531-CZ (Marquette Circuit Court, August, 19, 1980).

Finally, Pennhurst did not discuss section 1983 nor did it overrule Scheuer v Rhodes 416 US 232 (1974). Demery v Kupperman 735 F2d 1139 (9th Cir. 1984) at 1150 held:

> "Neither Edelman nor Pennhurst II changes the well-settled rule that the Eleventh Amendment does not bar suits seeking damages for violation of federal law from state officials personally... Because an interpretation of the Pennhurst II language that is consistent with both Scheuer v Rhodes and decades of section 1983 jurisprudence is available, we decline to interpret Pennhurst II as having effectuated such a radical change in the established law of civil rights".

Additionally, the Court of Appeals found that because the Michigan Department of Corrections was required to act pursuant to the requirements of a rule and had failed to do so, it was wholly without legal authority to act. Such being the case, it is absurd to contend that the individual state officials were acting within the scope of their authority and on behalf of the State.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

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